# SUPREME COURT OF THE UNITED STATES.

## No. 294.

MARSHALL O. ROBERTS, PLAINTIFF IN ERROR,

vs.

HENRY M. GRAHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is on the said circuit court of the United States for the northern district of California, before you, between Henry M. Graham and Marshall O. Roberts, manifest error hath happened, to the great damage of the said Marshall O. Roberts, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

2 together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, the tenth day of March, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the 90th.

[SEAL.] GEO. G. GORHAM, *Clerk*,
By W. F. HUESTIS, *Deputy Clerk*.

The above writ of error is allowed. San Francisco, August first, 1865.

STEPHEN J. FIELD,
*Associate Justice U. S. Supreme Court.*

3 Writ obeyed by returning the annexed papers certified.

GEO. C. GORHAM,
*Clerk U. S. C. C't, Nor. Dis. Cal.*

4 Filed Aug. 1st, 1865.

GEO. C. GORHAM, *Cl'k*,
By W. F. HUESTIS, *Dep. C.'k*.

5 UNITED STATES OF AMERICA, *ss:*

To Henry M. Graham, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein Marshall O. Roberts is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be cor-

rected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Stephen J. Field, one of the justices of the said Supreme Court of the United States, this first day of August, in the year of our Lord 1865.

STEPHEN J. FIELD,
*Associate Justice of U. S. Supreme Court.*

8 Service of a copy hereof admitted this 1st day of August, 1865.

EDWARD TOMPKINS, *Pl'ff's Att'y.*

Filed Aug. 1st, 1865.

GEO. C. GORHAM, *Cl'k,*
By HUESTIS, *Dep. Clerk.*

9 *Complaint.*

In the district court of the fourth judicial district, in and for the city and county of San Francisco and State of California.

HENRY M. GRAHAM
*vs.*
MARSHALL O. ROBERTS.

Henry M. Graham, pl'ff, complains of Marshall O. Roberts, def't, as follows: That the said defendant at the time of the making of the contract hereinafter mentioned was, since, has been and yet is engaged in the business of carrying passengers for hire between the city of New York, in the State of New York, and the city of San Francisco, in the State of California; that said business was carried on by means of a line of steamships belonging to the de-
10 fendant, commonly known and designated as the People's Opposition Line, consisting of the steamships Illinois and Moses Taylor; that passengers by said line were carried by the Illinois from New York to Aspinwall, upon the isthmus of Darien; thence, by the Panama railroad, employed by def't for that purpose, across the Isthmus to Panama; and thence by the Moses Taylor to San Francisco; that on and prior to the 13th of November, 1863, the said def't caused to be inserted in the New York Tribune, a newspaper published in the city of New York, and in other public newspapers, an advertisement inviting passengers bound for California to
11 take passage in his said line, and representing that his said steamers were the "safest and fastest" boats that were running upon said route, and that said steamer Illinois would leave New York on the said 13th of November, 1863, for Aspinwall as aforesaid; that said plaintiff saw said advertisement, and believing the same to be true, and desiring to go from New York to San Francisco with his wife and child, did, in consequence of the representations in said advertisement contained, on or about the 11th of Nov., 1863, apply at the office of said def't in the city of New York, the same being the place designated in the said advertisements as the office of the said line and where tickets were for sale, for tickets for himself and his

said wife and child from New York to San Francisco; that be-
12 fore purchasing said tickets, he was informed by the agent of the defendant, who was then and there in charge of said office, and was placed there by the said def't for the purpose of selling tickets for him for said line, and of making contracts for him for the transportation of passengers by said line as aforesaid, that the Moses Taylor would be ready at Panama to connect with the Illinois on her arrival at Aspinwall, and there would be no detention upon the said isthmus, and that passengers by them would reach San Francisco in twenty-two, or twenty-four at the outside; that thereupon pl'ff made a contract with said def't by his said agent to transport the pl'ff and his said wife and child as first cabin passengers by said line from New York to San Francisco, to leave New York
13 on said 13th day of Nov., and to supply them with suitable and proper accommodations, provisions, and supplies during said trip; that the price demanded therefor, was $210 each for pl'ff and his wife, and $105 for his said child, the said child being but 6½ years of age; and it was expressly stated, as part of said contract, that said child should have "first cabin fare," and was to be in all respects suitably and comfortably provided during said passage; that pl'ff paid to said agent for the said def't the said sums, being together $525, and received from him tickets entitling him and his said wife and child to first cabin passage by said line to
15 San Francisco as aforesaid; and said pl'ff avers, that but for the said representation that there would be no detention upon the isthmus, he would not have taken the said passage by said line, nor paid the said money to the said def't therefor; that another and rival line left New York on the same day for San Francisco, by which pl'ff and his said wife and child could have taken passage, by which there would have been no detention there; that pl'ff well knew that such detention would cause great exposure and probable injury to the health of himself and his said wife and child, and that but for said representation he would have taken passage by said other line.

The said plaintiff further shows, that in pursuance of said
16 contract he and his said wife and child left New York on the said 13th day of November, 1863, upon said deft's steamer Illinois, and were carried to Aspinwall aforesaid. That on their arrival there the said Moses Taylor had not arrived at Panama; that in consequence of her failure to connect with the said Illinois, the passengers, including pl'ff and his said wife and child, were forced to remain eleven (11) days at Aspinwall; that the weather was very hot and unhealthy, and that plaintiff and his said child were each made sick thereby; that before leaving the said isthmus the plaintiff was taken with a fever, that, as he is advised by his physician and verily believes, was entirely owing to the said detention upon said
17 isthmus; that the same continued and increased until after his arrival at San Francisco, and that for several weeks thereafter he was seriously and alarmingly ill by reason thereof; that he is advised by his physician and verily believes that his health is permanently affected thereby, and that it will be a long time before he will

be able, if he should ever be, to attend to business or to do any work for the support of himself and his family.

The said pl'ff further shows, that after a detention of eleven days upon said isthmus, the said Moses Taylor having then arrived at Panama, the pl'ff and his said wife and child were transferred thereto; that such transfer was made in the middle of a damp and foggy
18 night, whereby the exposure and injury to the health of pl'ff and his said wife and child were greatly increased; that no place was furnished for his said child to sleep upon said Moses Taylor during the voyage from Panama to San Francisco; that the servants of the def't in charge of said Moses Taylor refused to furnish said child with a bed or even with a blanket upon which it could rest; that it was furnished only with second cabin fare that was unhealthy and unfit for a child of tender years; that by reason thereof the illness of said child was greatly aggravated, and that it since has been and yet is so feeble as to require constant attendance and care from physicians and from the wife of the plaintiff, and that the same
19 was caused by the failure as aforesaid of the said def't to keep and fulfil said contract on his part.

The said pl'ff further shows, that, as he is informed and believes, the said def't well knew before said contract was made as aforesaid, and before said representations were made to pl'ff that there would be no detention on the isthmus, that the Moses Taylor would not and could not be at Panama on the arrival of the Illinois at Aspinwall or for several days thereafter; that he was advised by telegraph by his agent in San Francisco that the said Moses Taylor had not then left San Francisco, and that he well knew that there must be several
20 days detention upon said isthmus; that he concealed the same from the pl'ff, and that the same was not known to the pl'ff until after he had made said contract and had left New York on the Illinois as aforesaid.

The said pl'ff further states, that he made the said contract in good faith and fully kept and performed the same on his part; that the said defendant, disregarding his said contract, wholly failed to keep and perform the same; that he did not transport the pl'ff and his said wife and child from New York to San Francisco in 23 days or 24 days at the outside, but that on the contrary thereof it was 37 days
21 from the time they left New York until they arrived at San Francisco, the said Moses Taylor not arriving there till December 20th; that he did not transport them as aforesaid without any detention upon the isthmus, but that on the contrary thereof he detained them there eleven days; that he did not furnish them with first cabin fare, but that the said child of the pl'ff was furnished only with second cabin fare of the poorest quality; that he did not furnish them with suitable and proper accommodations, provisions and supplies, but that on the contrary thereof he overloaded the said Moses Taylor with a number of passengers wholly out of proportion to her size and much greater than she could suitably accommodate, and that by rea-
22 son thereof the pl'ff and his said wife and child were subjected to great inconvenience and injury.

The said pl'ff further shows that he is a lawyer, and came to California as aforesaid for the purpose of practicing his said profession; that by reason of the failure of the said def't to keep and fulfil his contract as aforesaid, he has been rendered unable to pursue his said profession, and, as he is advised and believes, is permanently disabled therefrom. The said pl'ff further states that by reason of all and singular the premises and of the failure of the def't to perform and keep his said contract on his part, as hereinbefore stated,
23 he has been subjected to great bodily illness and suffering; to great losses and expenses for nurses and medical attendance upon himself and also upon his said child, amounting to four hundred dollars and upwards; that he has been deprived of the services, comfort and affection of his said child; that he has been prevented from pursuing his said profession, and deprived of large gains and profits that he would have made thereby, and that he has been therewise damaged by reason of the premises to $25,000 and upwards.

Wherefore the said plaintiff demands judgment against the said def't for twenty-five thousand dollars and costs.

EDWARD TOMPKINS, *Pl'ff's Att'y.*
HENRY M. GRAHAM.

24 *Verification to complaint.*

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

The above named pl'ff being sworn says that he has read the above complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HENRY M. GRAHAM.

Sworn this 18th day of March, 1864, before me.
[SEAL.] GEO. T. KNOX, *Not. Pub.*

Indorsed: Filed March 19, 1864.
WM. LOWERY, *Clerk.*
By JAS. E. ASHCOM, *Dep. Cl'k.*

25 *Summons.*

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.

HENRY M. GRAHAM
*vs.*
MARSHALL O. ROBERTS.

Action brought in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California send greeting to Marshall O. Roberts, defendant:

26 You are hereby required to appear in an action brought against you by the above named plaintiff in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within this county, or, if served out of this county but in this district, within twenty days; otherwise, within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

27 The said action is brought to recover the sum of $25,000 damages alleged to have been sustained by the said plaintiff by reason of the breach of the contract mentioned in the complaint on file herein by the said def't and costs of action, said contract being to convey the pl'ff, his wife and child from New York to San Francisco. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

28 Given under my hand and seal of the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, this 19th day of March, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] WM. LOWERY, *Clerk*,
By JAS. E. ASCHAM, *Deputy Clerk*.

Indorsed: Filed this 23d day of May, *this 23d day of May*, A. D. 1864.
WM. LOWERY, *Clerk*,
By JAS. E. ASHCOM, *D. C.*

I hereby certify the foregoing to be a full, true, and correct copy of the original complaint and summons on file in my office in the above entitled cause.

[SEAL.] WM. LOWERY, *Clerk*,
By JAS. E. ASHCOM, *D. C.*

Indorsed: Filed June 18, 1864.
HENRY C. HYDE, *Cl'k.*

29 *Certified copy of order transferring cause.*

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco, April term—April 7, 1864.

Present: Hon. E. D. Sawyer, judge.

HENRY M. GRAHAM, plaintiff,
*vs.*
MARSHALL O. ROBERTS, defendant.

On reading and filing the petition of Marshall O. Roberts, the above named defendant, he having at the time of presenting his said petition entered his appearance in this action, and also presented and offered

a good and sufficient bond with good and sufficient surety for
30 his entering in the circuit court of the United States for the northern district of California on the first day of its next session, copies of the process against him in said action and also for his there appearing in said action, it is ordered that such surety be and the same is hereby accepted, and the said cause be and the same hereby is transferred to the circuit court of the United States in and for the northern district of California.

I hereby certify the foregoing to be a true and correct copy of the order entered on the minutes of said fourth district court in the above entitled cause.

Attest my hand, and the seal of said district court, this 16th day of May, A. D. 1864.

[SEAL.] WM. LOWERY, *Clerk*,
By JAS. E. ASCHOM, *Deputy Clerk*.

Indorsed: Filed June 18, 1864.

HENRY C. HYDE, *Clerk*.

31 *Order entering cause in circuit court of the U. S.*

At a regular term of the circuit court of the United States for the northern district of California, in and for the northern district, held at the court-house in the city of San Francisco, on Saturday the 18th day of June, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The honorable Stephen J. Field, associate justice of the U. S. Supreme Court, the honorable Ogden Hoffman, U. S. district judge.

HENRY M. GRAHAM *vs.* M. O. ROBERTS. } At common law.

And now at this day, on motion of Delos Lake, esq., and producing certified copy of the process and other papers and of the order transferring this cause from the fourth district court of the State
32 of California, for the city and county of San Francisco, to this court, it is ordered that said papers be filed, and that said cause be entered in this court, *nunc pro tunc*, as of the first day of the present term.

33 *Answer.*

In the circuit court of the United States for the northern district of California.

HENRY M. GRAHAM *against* MARSHALL O. ROBERTS. }

The defendant answering the plaintiff's complaint shows to the court that he admits that he was engaged in carrying passengers, and agreed to take the plaintiff and his wife and child and passengers as

stated in the complaint, and that he received the sum of five hundred and twenty-five dollars; that they were to be carried by
34 the steamers Illinois and Moses Taylor, in the first cabin; but he on his information and belief denies that any time was fixed within which the voyage or carriage would be performed.

This defendant, further answering, denies that he published the above advertisement of the contents as stated in the complaint, and answering, upon his information and belief, he denies that before purchasing said tickets the plaintiff was informed by the defendant's agent that the said Moses Taylor would be ready at Panama to connect with the Illinois on her arrival at Aspinwall, or that there would be no detention upon the said isthmus, or that passengers by them
35 would reach San Francisco "in 23 days or 24 at the inside," or otherwise, or that the plaintiff purchased his tickets or made any contract upon the faith of any such representations.

This defendant denies that any agent of his at the city of New York had any authority or right to make any of the representations in that behalf set forth in the complaint, and on his information and belief he denies that he did make any such representations, but, on the contrary thereof, this defendant avers that it was a fact well known to the public and also to the plaintiff, as defendant is informed and believes, that the steamer Moses Taylor was expected to sail
36 from San Francisco on the same day on which the Illinois would sail from New York, to wit, on the 13th of November, 1863, and it was communicated to the plaintiff at the time he purchased the tickets of passage that there would be a detention on the isthmus of several days.

The defendant further answering, on his information and belief, denies that but for the representations that there would be no detention upon the isthmus, the plaintiff would not have taken passage upon the said line or paid his money therefor; that he admits that a steamer of another line left New York on the same day for the
37 isthmus of Panama, but he avers that the rates of passage thereby were higher than by the defendant's line; that he has no knowledge or information sufficient to form a belief whether there would have been any detention of the plaintiff on the isthmus if the plaintiff had taken that line. And the defendant avers, upon his information and belief, that the plaintiff having full notice that there would necessarily be a detention of several days upon the Isthmus, awaiting the arrival of the Moses Taylor, the plaintiff chose the defendant's line because the rates of passage thereby were cheaper, and also with the agreement and understanding that during the
38 detention on the isthmus, he and his wife and child would be subsisted on board the steamers free of charge. That this defendant has no knowledge or information sufficient to form a belief whether the plaintiff knew that the alleged detention would cause great or any exposure or probable injury to the health of himself or his wife and child; and he denies on his information and belief that but for the alleged representations in the complaint stated, the plaintiff would have taken passage by the other line.

And defendant further answering, avers that he is informed and believes that the passengers by the steamship Illinois on the trip referred to in the complaint remained six days at Aspinwall, and
39 three days at Panama, including the transit across the isthmus; and defendant denies each and every allegation in the complaint as to detention at Aspinwall or on the isthmus, to the contrary thereof.

This defendant further answering, denies any knowledge or information sufficient to form a belief as to whether the weather was hot or unhealthy, or whether the plaintiff or his child were made sick thereby, or whether they were sick, or whether he was taken with a fever, or whether his alleged sickness continued or increased till after his arrival at San Francisco, or whether for any period of time
40 thereafter the plaintiff was seriously or alarmingly or otherwise ill, or if so, whether it was by reason of the alleged detention, or whether he was advised by physicians, or believed that his alleged sickness was owing to his alleged detention on the isthmus, or whether he is advised by any physician, or believes, or whether the fact is that the plaintiff's health is permanently affected thereby, or whether it will be a long time or any time before the plaintiff will be able, or whether he is not able to attend to his business, or to do any work.

The defendant further answering, denies any knowledge or
41 information sufficient to form a belief as to the time or condition of the weather when the plaintiff and his wife and child were transferred to the Moses Taylor, or whether the injury to the health of the plaintiff or his wife or child was increased by the alleged exposure.

And further answering on his information and belief, defendant denies that no place was furnished for the plaintiff's child to sleep upon said steamship Moses Taylor during the voyage from Panama to San Francisco, or that defendant's servants refused to furnish said child with a bed or blanket on which it could rest, or that it was furnished only with second cabin fare, or that such fare was un-
42 healthy or unfit for a child of tender years, or that if the said child was ill, its illness was aggavgated or caused by the failure of the defendant to keep or fulfil the contract on his part made with the plaintiff.

This defendant further answering, denies that he concealed, and on his information and belief he denies that any agent of his concealed from the plaintiff, or that it was not known to the plaintiff until after he had left New York on the Illinois, or until after he had made his said contract, that the Moses Taylor would not arrive at Panama until several days after the Illinois arrived at Aspinwall.

And this defendant further answering, denies the allegation
3 as to his having received any advices by telegraph from San Francisco, or that he concealed any advices he had from the plaintiff, as stated in that behalf in the complaint.

And this defendant, further answering, denies that he disregarded his contract, or wholly or in any part thereof failed to keep or per-

form the same; and he avers that he wholly and fully performed the conditions of said contract on his part to be performed.

And the defendant, further answering on his information and belief, denies that the plaintiff and his wife and child were detained
44 eleven days on the isthmus, or that he did not furnish them with first cabin fare, or that the child of the plaintiff was furnished only with second cabin fare, or that the fare was of poor quality, or that he did not furnish them with suitable or proper accommodations or provisions and supplies, or that he overloaded the Moses Taylor with a number of passengers out of proportion to her size or greater than she could suitably accommodate, or that by reason thereof the plaintiff or his wife or child were subjected to any inconvenience or injury, or that by reason of the failure of the defendant to fulfil his contract the plaintiff has been unable
45 to pursue his profession or disabled permanently or otherwise therefrom.

This defendant further answering denies that by reason of any failure on his part to keep or perform his contract with the plaintiff the plaintiff has been subjected to any bodily illness or suffering, or to any loss or expense for nurses or medical attendance upon himself or child, in any sum whatever, or been deprived of the comfort, services or affection of his said child, or been prevented from pursuing his profession, or deprived of large or any gains or profits that he would have made thereby, or that he has been otherwise damaged in any sum of money whatever. Wherefore defendant de-
46 mands that the said complaint be dismissed with costs to this defendant.

STATE OF NEW YORK, *City and County of New York, ss:*

Marshall O. Roberts, of said city, being duly sworn, says he is the defendant in the foregoing action; that he has read the foregoing answer and knows the contents thereof; that the foregoing answer is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

MARSHALL O. ROBERTS.

Subscribed and sworn to before me by the said Marshall O. Roberts, the deponant, this second day of May, A. D. 1864, as witness my hand and seal of office.

[SEAL.] J. B. NONES,
*A Commissioner for the State of California, residing in the City and County of New York.*

Indorsed: Filed June 18, 1864.

HENRY C. HYDE, *Clerk.*

47 *Stipulation.*

In the circuit court of the United States for the northern district of California.

HENRY M. GRAHAM
*vs.*
MARSHALL O. ROBERTS.

It is hereby stipulated that the complaint herein be and the same is hereby is amended by inserting in the first line, after the word "plaintiff," the words "a citizen of the State of California," and in the second line, after the word "defendant," the words "a citizen of the State of New York;" that said amendments may now be made in the original complaint on file, and that it shall not be necessary for the plaintiff to file an amended complaint. That all new matter in the answer be considered as denied in due form by the plaintiff, and that it shall not be necessary for him to file any
48 reply to said answer, but the same shall be in all respects at issue and tried as if fully denied. That if it be necessary in any other respect to amend the pleadings herein so as to give this court complete jurisdiction, the same are hereby so amended, and this stipulation shall be attached to and form a part of the record in this action.

Sept. 7, 1864.

DELOS LAKE, *Att'y for Def't.*
EDWARD TOMPKINS, *Att'y for Pl'ff.*

Indorsed: Filed Oct. 25, 1864.

G. C. GORHAM, *Cl'k.*

49 *Judgment.*

U. S. circuit court northern district of California. Tenth circuit, regular term A. D. 1865.

HENRY M. GRAHAM
*vs.*
M. O. ROBERTS.
At common law.

This cause being duly at issue upon the pleadings and papers transferred from the fourth judicial district court of the State of California, and having been regularly reached in its place on the calendar, came on for trial at the October term of said court, to wit, on the 25th day of October, A. D. 1864, and the said parties appearing by their respective attorneys, Edward Tompkins, esq., on behalf of plaintiff, and Delos Lake, esq., on part of the defendant, and a jury being duly impanelled and sworn, and the allegations and
50 proofs having been presented and made in part, and said cause being continued from day to day for the further hearing, and the same having been finally submitted on the 27th day of October, 1864, the jury thereupon, after being instructed by the court in the law of the case, after due deliberation, found and returned the following verdict, which was recorded, to wit:

H. M. GRAHAM
*vs.*
M. O. ROBERTS. } U. S. circuit court N. dist. Cal'a.

We the jury in the above cause find for the plaintiff, damages in the sum of ten thousand dollars.

W. P. JONES, *Foreman.*

51 Whereupon, by consent of the parties in open court, it was ordered that the motion for a new trial be made upon the judges, minutes, which by agreement are made to include the notes of the phonographic reporter, A.J. Marsh, esq., and that all proceedings on the verdict herein be stayed until such motion is disposed of, and the defendant have leave to turn the case into a bill of exceptions.

Whereupon said motion heretofore filed and made herein by defendant for vacating and setting aside the verdict of the jury and for a new trial in this cause is argued by respective counsel, submitted, and by the court taken under advisement.

52 And now at this day, to wit, the 13th of February, A. D. 1865, came the parties by their respective counsel as before, and the motion of defendant heretofore argued and submitted for a rehearing in this cause is by the court overruled and denied; and judgment is ordered in favor of the said plaintiff and against the said defendant for the sum of ten thousand dollars, the verdict of the jury herein, and costs.

It is therefore considered that the said Henry M. Graham, plaintiff, do recover of and from the said Marshall O. Roberts, defendant, his damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed at ten thousand dollars, and also the further sum of
53 ten hundred twenty-one dollars and sixteen cents, for his costs and charges by the said court now here adjudged to the said plaintiff and with his assent, which said damages, costs, and charges amount in all to eleven thousand and twenty-one dollars and sixteen cents.

Judgment entered this 21st day of July, A. D. 1865.

GEO. C. GORHAM, *Clerk,*
By W. F. HUESTIS, *Dep. Clerk.*

55 *Bill of exceptions.*

United States circuit court, northern district of California.

HENRY M. GRAHAM
*vs.*
MARSHALL O. ROBERTS. }

Afterwards, to wit, at the day and place within named, before the honorable Ogden Hoffman, one of the judges of the said circuit court, comes as well the said Henry M. Graham, by Edward Tompkins, esq., his attorney and counsel, as the said Marshall O. Roberts, by Delos Lake, esquire, his attorney and counsel, and the jurors of the jury whereof mention is within made being called likewise came, and

after being elected, tried, and sworn to try the several issues
56 within joined, the counsel for the said plaintiff on his behalf gave evidence tending to prove the contract as set forth in the complaint; also evidence tending to prove that the plaintiff and his wife and child named in the complaint were detained on the isthmus of Darien seven days, and that such detention was caused by the non-arrival of the steamer Moses Taylor at Panama; that the non-arrival was not caused by any accident or casualty, but was occasioned by her not sailing from San Francisco in time to reach Panama before the day abovenamed, and that the defendant at the time of making said contract had reason to believe that the plaintiff and his said
57 wife and child would be detained for the cause aforesaid on said isthmus for the said period of seven days; also evidence tending to prove that by reason of the detention on the isthmus and exposures consequent thereon, and also for want of proper comforts, conveniences, and food while on the Moses Taylor between Panama and San Francisco, the plaintiff's child contracted severe illness, which continued for a long period of time after the termination of the voyage. The plaintiff also gave testimony tending to prove that he contracted a severe illness on said voyage and journey from New York to San Francisco which continued for a long time after
58 the termination of the voyage; also evidence tending to prove that such illness of the plaintiff was caused by exposure caused by his not having a sufficient quantity of bed or berth-clothing on the steamer Moses Taylor on the voyage on the Pacific ocean between Panama and San Francisco; that bed-clothing had been furnished him, but that he was compelled to deprive himself of it in order to supply his child, which child had not been furnished with a berth or bed-clothing.

After the evidence was closed the defendant's counsel requested the judge to charge the jury that in assessing the damages by
59 reason of sickness suffered by the plaintiff personally during said voyage and consequent thereon they must exclude all damages caused or contracted by want of sufficient bed or berth-clothing on the steamer Moses Taylor, because there is no allegation in the complaint on which to base a recovery for such injuries, and because the allegation in the complaint is that the plaintiff's sickness was caused by exposure and detention on the steamer. Which charge and instruction the judge refused to give, to which ruling and refusal the defendant's counsel duly excepted.

And the said judge thereupon charged the jury that if they
60 found from the evidence that the plaintiff's sickness and consequent injuries was caused by exposure by reason of not being furnished with a sufficient quantity of bed-clothing on the steamer Moses Taylor, then they must estimate the damages to plaintiff caused by such exposure and want of sufficient clothing or covering for his berth, and by his illness consequent thereon, and include such damages in their verdict. To which charge and instruction the defendant's counsel then and there excepted.

The judge also charges the jury that under the pleadings the plaintiff was entitled to recover for injuries or discomforts suffered
61 by him on the steamer Moses Taylor by reason of a scarcity or want of clothing for his bed or berth. To which last charge and instruction the defendant's counsel excepted.

And because none of the exceptions so suffered and made to the decision of the said judge do appear upon the record of the said trial, therefore on the prayer of the said defendant by his said counsel the said judge hath to this bill of exceptions set his seal this 18th day of April, 1865.

OGDEN HOFFMAN, *Dis't Judge.* [SEAL.]

Indorsed: Filed July 19, 1865.

GEO. C. GORHAM, *Cl'k,*
By HUESTIS, *Dep't'y.*

63 In the circuit court of the United States in and for the northern district of California.

MARSHALL O. ROBERTS, plaintiff in error,
*vs.*
HENRY M. GRAHAM, def't in error.

I, George C. Gorham, clerk of the circuit court of the United States in and for the northern district of California, do hereby certify that the foregoing pages contain a full, correct, and faithful transcript of the record in the above-entitled cause.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court at the city of San Francisco this twelfth day of October, A. D. 1865.

[SEAL.] GEO. C. GORHAM, *Clerk.*

Filed November 15, 1865.

# Supreme Court of the United States.

MARSHALL O. ROBERTS,
*Plaintiff in Error,*

*vs.*

HENRY M. GRAHAM,
*Defendant in Error.*

## Statement and Points for Plaintiff in Error.

The plaintiff in error brings this writ to review a judgment entered against him on the 21st day of July, A. D., 1865, in the United States ~~District~~ Circuit Court for the Northern District of California, for $11,021.16, in favor of the above-named defendant in error.

## Statement of Facts.

The action was for damages for not carrying Mr. Graham, the plaintiff, his wife and child, from New York to San Francisco, in the manner agreed by Mr. Roberts, through his agents, as set forth in the complaint (folios 10 to 23).

The plaintiff alleged false representations, which led him to take passage in the defendant's steamer, "Illinois," at the port of New York—detention at the Isthmus, during which he and his wife and child became sick—that he took a fever there because of such detention, which increased until his arrival at San Francisco, permanently affecting his health—that he, his wife and child were transferred to the "Moses Taylor," by defendant's agents at Panama, in such manner

that the sickness of such wife and child were greatly increased, and that they were subjected to other grievances detailed in the complaint.

The bill of exceptions shows (folio 59) that "after the evidence was closed, the defendant's counsel requested the judge to charge the jury that in assessing the damages by reason of sickness suffered *by the plaintiff personally* during said voyage (from Panama to San Francisco) and consequent thereon, they must exclude all damages caused or contracted by want of sufficient bed or berth clothing on the steamer "Moses Taylor," because there is no allegation in the complaint on which to base a recovery for such injuries, and because the allegation in the complaint is that the plaintiff's sickness was caused by exposure and detention on the steamer."

The Court refused so to charge, and the defendant's counsel excepted.

The Court then charged the jury, "that if they found from the evidence that the plaintiff's sickness and consequent injuries was caused by exposure by reason of not being furnished with a sufficient quantity of bed-clothing on the steamer 'Moses Taylor,' then they must estimate the damages to plaintiff caused by such exposure and want of sufficient clothing or covering for his berth, and by his illness consequent thereon, and include such damages in the verdict."

To this charge the defendant's counsel also excepted.

The Court further charged, that "under the pleadings, the plaintiff was entitled to recover for *injuries* OR *discomforts* suffered by *him* on the steamer 'Moses Taylor,' by reason of a scarcity or want of clothing for his bed or berth."

To this instruction, also, defendant's counsel excepted.

## Complaint and Answer.

The substance of the complaint is, that the plaintiff was induced to take passage in the "Illinois," by representations

that the defendant's steamers on the Nicaragua route were the "safest and fastest" on that route; that the "Moses Taylor" would be ready at Panama to connect with the "Illinois" on her arrival at Aspinwall; that there would be no detention on the Isthmus, and that the passengers would reach San Francisco in twenty-four days "at the outside." That the plaintiff took passage for himself, wife, and child, as first-cabin passengers, and defendant agreed "to supply them with suitable and proper accommodations, provisions and supplies, during said voyage;" and the child was to have "*first-cabin fare*," and to be, in all respects, "suitably and comfortably provided during said passage." *Folios* 10 *to* 15.

The breach of agreement, or falsehood of representation, consisted in the following:

1st. That the "Moses Taylor" had not arrived at Panama when the "Illinois" arrived at Aspinwall. In consequence, he and his family were detained at Aspinwall eleven days. (Fol. 16.) The weather was very hot and unhealthy, and plaintiff and his child were "each made sick thereby." "BEFORE LEAVING THE ISTHMUS" he got the fever, which "continued and increased (fol. 17) until after his arrival at San Francisco."

So much as to what occured *before* his arrival at Panama.

2d. At Panama "the plaintiff and his said wife and child were transferred" to the "Moses Taylor," the transfer being made "in the middle of a damp and foggy night, whereby the exposure and injury to the health of plaintiff and his said wife and child were greatly increased."

It is then alleged (fol. 18) that the *child* was not properly accommodated with a bed, &c., during the voyage from Panama to San Francisco, *but nothing whatever is said here or elsewhere in the complaint about any neglect or want of care or provision* FOR THE PLAINTIFF HIMSELF, either as to bed, berth,

bedding, want of clothing or covering, or any exposure, injury, or discomfort to him ON THAT VOYAGE.

The answer denied all the material averments of the complaint. (*Folios* 33 to 46.)

## POINTS.

FIRST.—The Court erred in the refusal to charge (folio 59), and the instruction (folio 60).

1. The synopsis of the complaint shows that there was no averment to warrant giving damages for any discomfort of the plaintiff while on the "Moses Taylor."

2. The Pleader has shown that in his view it was necessary to aver specially every act or omission the consequence of which was a wrong to the plaintiff for which damages might be claimed. This is seen in the particularity of such averments which pervades the complaint.

3. Such particularity was necessary. The case presented two prominent grounds of action:

   *a.* Detention at Aspinwall, and consequent injury there.

   *b.* Misconduct of defendant's agents at Panama and on the Pacific.

   ☞ *No complaint whatever is made of any wrong between New York and Aspinwall affecting the plaintiff personally.*

4. The rules of pleading require that the injury complained of should be stated with such fullness and certainty in the declaration as to leave no reasonable doubt of the particular transaction on which the plaintiff relies, and which he intends to prove to establish his right of action.

1 *Chitty's Pleadings*, 244.
*Relyea* vs. *Drew*. 1 *Denio*, 561.
*Wilbur* vs. *Brown*, 3*d Id.*, 356.
*Walker* vs. *Moseley*, 5*th Id.*, 102.
Green vs Palmer 15 Cal R 411
Broome vs Tabbins 14 " 457

This fundamental and just principle has not been departed from, even under the loose provisions of the N. Y. Code.

It was held in *Freeman* vs. *Fulton Fire Ins. Co.*, 14 *Abbott's Pr. Rep.*, 398, that "Everything which is necessary to sustain a plaintiff's case at common law, unless made unnecessary by statute, must be alleged in his complaint." See 11 *Howard's Pr. Rep.*, 415.

5. Another rule is, that equivocal pleading must be taken most strongly against the pleader.

*Slocum* vs. *Clark*, 2*d Hill's N. Y. Rep.*, 475.

6. As already shown, nothing is said in the complaint about exposure or sickness anywhere, causing injury to the plaintiff, except—

*a.* That he took the fever on the *Isthmus* (fol. 16).

*b.* That it "continued and increased until after his arrival at San Francisco, and that for several weeks thereafter he was seriously and alarmingly ill by reason thereof." (Fol. 17.)

☞THIS *continued illness is ascribed* EXCLUSIVELY *to the fever of the Isthmus, with no*

*reference whatever to what occurred at Panama or on the Pacific.*

*c.* That, by reason of the transfer to the "Moses Taylor" on a damp and foggy night, "the exposure and injury to the health of the plaintiff, *his wife and child, were greatly increased.*"

☞ *But not one word is said of any cause occurring on the "Moses Taylor," or during her voyage, affecting the health of plaintiff.*

Yet the Court charged that if the PLAINTIFF's sickness was "*caused by exposure by reason of not being furnished with a sufficient quantity of bed clothing* ON THE STEAMER 'MOSES TAYLOR,' *then they must estimate the damages to* PLAINTIFF caused by *such* exposure and want of sufficient clothing or covering for HIS berth, and by his illness consequent thereon, and include the damages in their verdict."

At fol. 61 the Court extended the same rule to "injuries or *discomforts* suffered by *him* on the 'MOSES TAYLOR' by reason of a *scarcity* or want of clothing for his bed or berth."

The defendant had no notice that any such allegation would be made at the trial, and could not have been prepared to meet it. The specific statement of the acts or omissions making no allusion whatever to such a complaint as this, the defendant was legally and morally warranted in assuming that he was not to meet any accusation of misconduct toward *him* on the "Moses Taylor." He had no reason to expect such a surprise.

"An averment of special damage is not traversable. It is required to be inserted to prevent a surprise on the defendant."

*Moloney* vs. *Dows*, 15 *Howard's Rep.*, 265.

Piercy vs Sabin 10 Cal R 28
Stevenson vs Smith 28 Pa 102

SECOND.—We have thus far treated the questions arising out of the Court's charge as matters of PLEADING, involving errors in directing the Jury to award damages for breaches

of duty not alleged in the complaint. Viewed in reference to the law of damages, the errors are just as great.

1st. "Damages which *necessarily* result from the injuries complained of are called general damages, and may be proved under a general demand for relief. But such damages as are the *natural* although not the *necessary* result of the injury are termed *special damages* and *must be stated in the complaint*, or the plaintiff can not prove them on the trial."

*Newton* vs. *Vanderslice*, 4 *Comstock*, 133.
*Law* vs. *Archer*, 2 *Kernan*, 282.
*Moloney* vs. *Dows*, 15 *Howard*, 265.
Dubovich vs Emerick 12 bal R 171

"Where the special damage is the *foundation of the cause of action*, it is a material allegation; and if not controverted, is admitted."

*Perring* vs. *Harris*, 2 *M. and Rob.*, 5.

In *Briggs* vs. *Vanderbilt*, 19 Barb., 322, the defendants were sued for damages for the breach of an agreement to carry a passenger on a particular vessel. It was not averred that defendants were bound to provide a substitute in case of the vessel's loss, nor were damages claimed for neglect or refusal to forward him in some other vessel. Held that the only damages plaintiff could recover was the return of the passage money and interest.

If the plaintiff was damnified beyond the damage necessarily arising from the breach complained of, or implied by law, he should have specified it in the complaint.

*Bojart* vs. *Burkhalter*, 2 *Barb.*, 525.

In the absence of special damage alleged, the rule is this: "On a breach of contract, the injured party cannot recover any other damages than such as would be naturally expected by both parties at the time it was made to follow its violation."

16 *N. Y.*, 489.
26 *Eng. L. & Eq.*, 398.
9 *Exch.*, 341, *Ib.*
Bedell vs Powell 13 Barb 183
Ford vs Monroe 20 Wend 210

THIRD.—The preceding propositions can not be met by the general averments in the complaint at folio 22, alleging that the defendant "wholly failed to keep and perform his agreement," and that he did not furnish the plaintiff, his wife and child, with "suitable and proper accomodations, provisions and supplies; but that, on the contrary thereof, he overloaded the said 'Moses Taylor' with a number of passengers wholly out of proportion to her size, and much greater than she could suitably accommodate; and that, by reason thereof, the said plaintiff, and his said wife and child, were subjected to great inconvenience and injury," folios 21, 22; nor by the other general averments at folio 23, because:

These follow the specific averments of special damage, and are in the nature of the *alia enormia*, under the common law system of pleading.

1st Chitty Pleas 378. 379.

The judgment should be reversed.

JAMES T. BRADY,
*Of Counsel for Plaintiff in Error.*

# Supreme Court of the United States.

DECEMBER TERM, 1867.

M. O. ROBERTS, *Plaintiff in Error*,
*vs.*
HENRY M. GRAHAM.

No. 49.

*Brief for Defendant in Error.*

This case comes up by writ of error to the Circuit Court for the Northern District of California.

The defendant in error, Graham, sued the plaintiff in error, Roberts, in the State court, for breach of contract to transport him, his wife and child, from New York to California, by way of Panama, furnishing them on the trip with suitable accommodations, provisions and supplies; and alleging for breach, a long detention on the Isthmus, and the want of ~~bed clothing~~ suitable accommodations on the steamer on the Pacific side, whereby he and his child were made ill by exposure, &c. The defendant below removed the cause into the Federal court, where it was tried before Judge Hoffman, and the jury rendered a verdict in favor of the plaintiff for $10,000. Motion for a new trial was made and overruled with leave to defendant "to turn the case into a bill of exceptions;" this was done and the bill was duly sealed. Rec. p. 12.

The exceptions are as follows:

1. The Judge refused to instruct the jury on defendant's prayer, that "in assessing the damages by reason of sickness suffered by the plaintiff personally during the said voyage, and consequent thereon, they must exclude all damages caused or contracted by want of sufficient bed or berth clothing on steamer Moses Taylor, because there is no allegation in the complaint on which to base a recovery for such injuries, and

because the allegation in the complaint is that the plaintiff's sickness was caused by exposure and detention on the steamer."

The judge rightly refused so to instruct, because the contract alleged in the complaint was that the defendant below agreed "to transport the plaintiff his wife and child * * and to *supply them with suitable and proper accommodations, provisions and supplies during that trip:*" Rec. p. 2, fol. 13. The breach: "That *he did not furnish them with suitable and proper accommodations, provisions and supplies:*" Rec. p. 4, fol. 21. The special damage: That "by reason thereof the *plaintiff* and his said wife and child, were subjected to great inconvenience and injury." Rec. p. 4, fol. 22. And again, "that by reason of all and singular the premises and of the failure of the defendant to perform and keep his said contract on his part, as hereinbefore stated, *he* (the plaintiff) *has been subjected to great bodily illness and suffering, &c., &c.*" The second branch of the objection is equally answered by this part of the complaint, for want of bed clothing is synonymous with exposure.

2. The judge instructed the jury that if they found that the plaintiff's sickness and consequent injuries was caused by want of bed clothing on the steamer, they must estimate the damages caused by *such* want of covering and include it in their verdict. This instruction was clearly right in view of the allegations made in the complaint above cited, and the fact that evidence was offered "tending to prove that such illness of the plaintiff was caused by exposure caused by his not having a sufficient quantity of bed or berth clothing on the steamer Moses Taylor." It is indeed added "that bed-clothing had been furnished him, but he was compelled to deprive himself of it in order to supply his child, which child had not been furnished with a berth or bed clothing."

The contract was with the plaintiff, to furnish him with bed clothing for himself, his wife and his child, and if that furnished was insufficient for all, it is not for the defendant to say that the father should have taken what there was and let his child suffer.

3. The judge also charged the jury that under the pleadings the plaintiff was entitled to recover for injuries or discomforts suffered by him on the steamer Moses Taylor by reason of a scarcity or want of clothing for his bed or berth.

It is submitted that the portions of the complaint above cited, fully sustain this instruction.

The whole case is one wherein the plaintiff complains of several and various defaults on the part of the defendant, constituting a breach of the contract to transport him and his family with reasonable diligence from New York to California, supplying on the way proper accommodations; and alleging injury to the plaintiff and his family by reason of one or more of such defaults. The evidence clearly proves the breach of contract and the consequent damage, and no want of extreme precision in the language of the complaint should be ground of reversal of the judgment.

J. M. CARLISLE,
J. D. McPHERSON,
*for Defendant in Error.*

# Supreme Court of the United States.

*No.* 49.

ROBERTS, PLAINTIFF IN ERROR,

*vs.*

H. M. GRAHAM.

ADDENDUM TO BRIEF FOR DEFENDANT IN ERROR.

Since our brief in this cause was filed, we have received that for the plaintiff in error, and submit the following additional points in reply:

1. As to the want of particularity in the complaint. (Point first of plaintiff in error.)

The California practice act of April 19, 1851, chap. 123, sec. 70, enacts that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties."

And section 71: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceeding which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

Had the complaint been defective for want of the particularity insisted on by the plaintiff in error, (which we say it was not,) the evidence offered of injury to the plaintiff below, by reason of exposure on the Moses Taylor, would have been admitted under these statutory rules, even if objected to when offered.

But such evidence was offered and received without objection, and objection now comes too late. If there be a variance between allegation and proof, the objection must be taken when the evidence is offered; otherwise it is waived. (Mosher *vs.* Lawrence *et al.*, 4 Denio, 419; Barnes *vs.* Perin, 2 Kern., 18; Belknap *vs.* Sealy, 4 Kern., 143.)

It is submitted that the judgment should be affirmed.

J. M. CARLISLE,
J. D. McPHERSON,
*For Defendants in Error.*